

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH GRICE,

Petitioner,

No. C 07-2490 PJH (PR)

vs.

JOHN MARSHALL, Warden,

Respondent.

**ORDER DENYING
PETITIONER'S MOTION FOR
DISCOVERY AND GRANTING
MOTION TO DISMISS**

Petitioner in this pro se habeas case has moved for leave to conduct discovery and respondent has filed a motion to dismiss.

A. Motion for Discovery

Petitioner moves for leave to conduct discovery. See Rule 6(a), Federal Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (no discovery in habeas cases except with leave of court upon showing of good cause). He has, however, not provided any explanation why the evidence he hopes to discover was not discovered and entered into the record before this, for instance by way of an evidentiary hearing in state court, nor has he provided any specific details about the information he expects to discover – that is, he wants to engage in a fishing expedition. The motion to allow discovery will be denied.

B. Motion to Dismiss

Respondent contends that the petition is mixed and should be dismissed.

In the order to show cause the court described petitioner's issue three as follows:

"[T]rial counsel was ineffective in not discovering and presenting evidence of self-defense."

Respondent asserts that this issue is not exhausted.

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1 An application for a federal writ of habeas corpus filed by a prisoner who is in state
2 custody pursuant to a judgment of a state court may not be granted unless the prisoner has
3 first exhausted state judicial remedies, either by way of a direct appeal or in collateral
4 proceedings, by presenting the highest state court available¹ with a fair opportunity to rule
5 on the merits of each and every issue he or she seeks to raise in federal court. See 28
6 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Petitioner has the
7 burden of pleading exhaustion in his or her habeas petition. See *Cartwright v. Cupp*, 650
8 F.2d 1103, 1104 (9th Cir. 1981).

9 The exhaustion requirement is satisfied only if the federal claim has been "fairly
10 presented" to the state courts. *Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1996). A claim is
11 "fairly presented" only if the petitioner either referenced specific provisions of the federal
12 constitution or federal statutes, or cited to federal or state case law analyzing the federal
13 issue. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). The specific
14 factual basis of the federal claim also must be presented to the highest state court. *Kelly v.*
15 *Small*, 315 F.3d 1063, 1067-69 (9th Cir. 2003) (finding unexhausted ineffective assistance
16 of counsel and prosecutorial misconduct claims where specific instances of ineffectiveness
17 and misconduct asserted in federal petition were neither in the California Supreme Court
18 petition nor discussed by the court of appeal).

19 The United States Supreme Court held in *Rose v. Lundy*, 455 U.S. 509 (1982), that
20 federal courts must dismiss a habeas petition which contains one or more unexhausted
21 claims. *Id.* at 522 (1982). If the petition combines exhausted and unexhausted claims,
22 *Rose v. Lundy* requires dismissal of the entire habeas petition without reaching the merits
23 of any of its claims. *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). However, the rule
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25 ¹ In California, the supreme court, intermediate courts of appeal, and superior courts
26 all have original habeas corpus jurisdiction. *Nino v. Galaza*, 183 F.3d 1003, 1006 n.2 (9th Cir.
27 1999). Although a superior court order denying habeas corpus relief is non-appealable, a state
28 prisoner may file a new habeas corpus petition in the court of appeals. *Id.* If the court of
appeals denies relief, the petitioner may seek review in the California Supreme Court by way
of a petition for review, or may instead file an original habeas petition in the supreme court.
Id. at 1006 n.3.

1 is not as absolute as might first appear. *Rose* itself provides that the dismissal must be
2 with leave to amend to delete the unexhausted claims; if they are deleted, the court can
3 then consider those which remain. See *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir.
4 2000). And there are two other exceptions: One is that when the petition fails to raise even
5 a colorable federal claim, it may be denied even if it is partly or entirely unexhausted, 28
6 U.S.C. § 2254(b)(2), and the other is that rather than dismiss, the court may stay a mixed
7 petition to allow the petitioner to return to state court to exhaust the unexhausted issue or
8 issues, *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

9 Petitioner filed a direct appeal from his conviction. It was affirmed by the California
10 Court of Appeal and the California Supreme Court denied review. He does not contend
11 that he filed any state habeas petitions. In the federal habeas petition issue three is very
12 clear: "Petitioner submits that trial counsel was ineffective at trial. Violating the right to
13 effective assistance." The facts in support are: "Trial counsel's failure to collect evidence
14 in support of the self-defense argument caused a domino effect of violation. Further, it did
15 not allow facts to be fully developed which denied the petitioner a fair trial." Respondent
16 has provided a copy of petitioner's petition for review in the California Supreme Court, and
17 no such ineffective assistance issue is contained in it. Mot. to Dismiss, Ex. C. It thus is
18 clear that petitioner did not present issue three to the highest state court available, the
19 California Supreme Court.

20 Petitioner contends that he did raise the substance of issue three in the California
21 Supreme Court by arguing that if there was no duty for the trial court to instruct sua sponte
22 on imperfect self-defense, counsel was constitutionally ineffective in failing to request such
23 an instruction. This is by no means the same as issue three, which goes to counsel's duty
24 to discover evidence of self-defense and to present it at trial. Petitioner's argument that he
25 sufficiently presented issue three in state court is wrong. And petitioner's contention that
26 his lack of an evidentiary basis made raising the issue in state court futile is wrong,
27 because in a state habeas action he might have been able to obtain an evidentiary hearing.
28 The motion to dismiss will be granted.

CONCLUSION

1. Petitioner's motion for leave to engage in discovery (document number 4 on the docket) is **DENIED**.

2. Respondent's motion to dismiss (document number 15 on the docket) is **GRANTED**.

3. Petitioner may chose from three possible courses of action: (1) he may dismiss this petition with an eye to exhausting and then filing another federal petition;² (2) he may amend the petition to dismiss the unexhausted issue, and proceed with those which are exhausted;³ or (3) he may ask for a stay of this case while he returns to state court to attempt to exhaust the ineffective assistance of counsel issue, then, if unsuccessful in state court, return here and ask that the stay be lifted. If he chooses the third option, asking for a stay, he must show "good cause" for his failure to exhaust sooner, that the issue is "potentially meritorious," and that he has not engaged in "dilatory litigation tactics." See *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

4. Petitioner must elect one of the three choices set out in section three within thirty days of the date this order is entered. If he does not, this case will be dismissed.

IT IS SO ORDERED.

Dated: March 3, 2008.


PHYLLIS J. HAMILTON
United States District Judge

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² This option is more apparent than real, because any subsequent federal petition would almost certainly be barred by the statute of limitations.

³ If he chooses this option he probably will not be able to file a future federal petition containing the plea bargain issue, because second federal petitions are generally barred by 28 U.S.C. § 2244(b)(2).